of course, give way to the context, but the context here justifies the view that the testator intended £500, and not £100."

For the above reasons I hold the gift in clause 6 fails. I set aside my earlier order made in Chambers. Costs to be paid out of the estate.

Order accordingly.

Solicitors: *Chooi & Co.; Cheah, Chew & Tan.*

DOROTHY KWONG CHAN v. AMPANG MOTORS LTD. & ANOR.

[A.C.J. (Raja Azlan Shah J.) March 26, 1969]
[K.L. — Civil Appeal No. 15 of 1967]

Hire-purchase — Motor car — Dealers agents of finance company — Motor car returned to finance company and taken in possession by it — Plea that motor car was not reasonably fit for the purpose for which it was hired — No breach of implied terms — Penalty — Damages — Allowance for accelerated payments.

The appellant claimed the return of $1,105 paid by her as part of the option money under a hire-purchase agreement relating to a motor car. The dealers pleaded that they were not agents of the finance company and therefore the action could not be brought against them. The finance company counterclaimed for damages for breach of contract and for arrears of two monthly instalments. The learned president of the sessions court held that the dealers were the agents of the finance company and that the action was rightly brought against them. He also held that the car that was contracted for was delivered to the appellant and that the defect in the car was not a defect that went to the root of the contract. The appellant had therefore committed a breach of the agreement by her failure to pay the instalments and he dismissed the appellant's claim and allowed the counterclaim for the finance company in the sum of $414.10.

Held, dismissing the appeal: (1) the learned president was right in holding that the dealers were the agents of the finance company;

(2) on the facts there was no breach of the implied stipulations of fitness and therefore the appellant had committed a breach of the agreement in refusing to pay the instalments and in returning the car;

(3) the provision in clause 6 of the agreement for the payment of compensation had every characteristic of a penalty and the claim founded on the clause must therefore fail;

(4) the finance company were entitled to damages and in assessing the damages an allowance or discount by way of rebate should be made in respect of accelerated payments to the finance company.

Cases referred to:—

(1) *Financings Ltd.* v. *Stimson* [1962] 3 All E.R. 386.

(2) *Branwhite* v. *Worcester Works Finance Ltd.* [1968] 3 All E.R. 104.

(3) *Astley Industrial Trust Ltd.* v. *Grimley* [1963] 2 All E.R. 47.

(4) *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* [1915] A.C. 79 at p. 86.

(5) *Bridge* v. *Campbell* [1962] 1 All E.R. 385.

(6) *Overstone Ltd.* v. *Shipway* [1962] 1 All E.R. 52.

(7) *Financings Ltd.* v. *Baldock* [1963] 1 All E.R. 443.

(8) *Yeoman Credit Ltd.* v. *Waragowski* [1961] 3 All E.R. 145.

(9) *Yeoman Credit Ltd.* v. *McLean* [1962] 1 All E.R. 57.

(10) *Interoffice Telephones Ltd.* v. *Robert Freeman Co. Ltd.* [1957] 3 All E.R. 479.

MAGISTRATE'S CIVIL APPEAL.

V. Oorjitham for the appellant.

Ronald Khoo for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is a hire-purchase case relating to a motor-car, a Ford Consul 375 De Luxe Saloon. The appellant was the hirer; the first respondents were the dealers; the second respondents were the finance company. The finance company bought the said car from the dealers and let it on hire-purchase to the appellant. In the action, the appellant claimed for the return of the sum of $1,105 paid by her as part of the option money under the agreement and damages for breach of contract. She pleaded that it was an implied term of the contract that the said car should be reasonably fit for the purposes for which it was hired and that in breach of the term the said car was not so fit and consequently she was entitled to repudiate the agreement.

In their defence the dealers pleaded that since they were not agents of the finance company or privy to the agreement, the appellant was not competent to bring the action against them.

The finance company pleaded that since the appellant had an opportunity to examine and test and did in fact examine and test the said car before signing the agreement, the implied condition of reasonable fitness (which is denied) did not avail the appellant. They put in further alternatives, among others: (1) they admitted the defects but contended that they were minor defects so that clause 1(iv) of the terms and conditions of the agreement exempted them from liability. Clause 1(iv) reads:—

"The owner gives no warranty whatsoever in respect of the vehicle as to description fitness roadworthiness repair or otherwise, nor shall the owner be responsible for any delay in delivery."

(2) They were willing and able to perform the agreement under the dealers' warranty clause to bring the said car to a mechanical condition which was expected of a new car of the same make and type, but the appellant refused. The finance company counterclaimed

for damages for breach of contract and for arrears of two monthly instalments.

The appellant filed a reply to the finance company's defence and counterclaim. She averred that she was neither competent nor required to discover latent defects in the said car and that she relied on the skill and judgment of the respondents as to the said car being fit for the purpose for which it was hired. She further pleaded that the finance company were not entitled to the sum claimed in the counterclaim as it was in the nature of a penalty.

After directing his mind to the broad principles enunciated in *Financings Ltd.* v. *Stimson,*[1] the learned president held that the dealers were agents of the finance company and therefore the action was rightly brought against them (the dealers). I agree with that conclusion. On the facts, it is impossible to think of the dealers as anything but the ostensible agents of the finance company. The dealers were a subsidiary for the finance company. They held the necessary forms; they handed them over to the hirer to sign; they received the deposit and the first instalment on behalf of the finance company. Most important of all, they handed over the car to the hirer as agent of the said company. The House of Lords case of *Branwhite* v. *Worcester Works Finance Ltd.*[2] has relevance. Lord Wilberforce (Lord Reid concurring, but the majority not concurring) came to the conclusion

> "That on the general question of the dealer's agency *Stimson's* case rather than *Gall's* ([1961] 2 All E.R. 104) should be regarded as correctly stating the principle as authoritative . . . ." (page 123).

The learned law Lord in an earlier passage explained,

> "That of Lord Denning M.R. and Donovan L.J., takes as a starting point the established mercantile background of hire-purchase transactions, as known to and acceptance by all three parties, takes that as establishing, in general, the basis for an agency relationship, and finally considers, against that background, any individual features of the particular case to see whether they confirm or weaken the agency inference." (page 121).

I think that is a realistic approach and well suited to the mercantile needs of this country. In any event there is no appeal against such finding.

As between the appellant and the finance company, the learned president found as a fact that the car that was contracted for was delivered to her. He also found that the defect in the car which was present at the time when the appellant took delivery was not a defect that went to the root of the contract. He further took the view that there was no breach of the implied condition of fitness and held that the finance company was not liable for any breach thereof. He also held that the appellant had committed a breach of the agreement by her failure to pay the instalments. He accordingly dismissed the appellant's claim and allowed the counterclaim of the finance company in the sum of $414.10, made up as follows: $204.10 representing actual loss and $210 representing arrears of two months instalments.

The facts as found by the learned president are as follows: on 17th July, 1963 the appellant saw a Ford Consul 375 De Luxe Saloon on the premises of the dealers. It was a new car but not of current model; it had been in stock for a considerable time. She looked inside the car and walked round it. She then drove it for about ten minutes. She was satisfied. The agreed price was $5,800 which was $1,000 less than the current model. She then signed a hire-purchase proposal form and a hire-purchase agreement prepared by the finance company and produced by the dealers. She then paid $1,000 as part of the option money under clause 1(ii) of the hire-purchase agreement and $105 as the first instalment. The hiring was for 24 months. She took the car home and showed it to her husband who, after having driven it, drew her attention to some "noises coming from it." A few days later she took the vehicle back to the premises of the dealers and complained of some defects and items missing. The dealers attended to the vehicle, after which she took it home. A couple of days later she brought the vehicle back to the dealers with further complaints and again it was attended to. Subsequently she again sent the car back with complaints and the dealers' engineer decided to change the rear axle from which seemed to come the humming noise in the vehicle about which she complained. As no spare axle was then available, the dealers, with her consent, removed an axle from another vehicle of the same model in the garage and fitted it to the appellant's car and the humming noise lessened. However, the appellant discovered subsequently that the power of the car had been reduced. She then sent the dealers a letter demanding that she be supplied with a brand new car or a refund of the money which she had paid. The dealers offered to send the car to Ford Motors in Singapore in order to bring it up to the standard satisfactory to the appellant at the dealers' expense. She turned down this offer and on 18th October, 1963, that is, three months after the date of the agreement, she returned the car to the premises of the dealers who received it on behalf of the finance company. It is significant to note that on 27th August, 1963 the car had done 2,091 miles. The finance company terminated the contract and repossessed the car. She then

brought the present action. The finance company counterclaimed.

It is clear from the decided cases that in a hire-purchase agreement in respect of an ordinary motor car for normal use on the road there are, subject to any express terms as to state of repair, condition, and so forth, two stipulations to be implied: (1) that the vehicle hired corresponds with the description, that is, the lender must lend that which he contracts to lend and not something which is essentially different — and this is a fundamental term which cannot be excluded by an exception clause, so that any breach of that term automatically gives the hirer a right to terminate the contract if he so wishes and sue for damages generally, or, at his option, to affirm the contract and treat it as subsisting and sue only for damages; (2) that the vehicle is as fit for the purpose for which it is hired as reasonable care and skill can make it. The obligation is in the nature of a warranty, breach of which entitles the hirer to a claim for damages only; it is not a condition which goes to the root of the contract a breach of which gives the hirer at once and without reference to the facts and circumstances a right to repudiate the whole contract. However, in certain circumstances the hirer is entitled to treat the contract as at an end. See the example illustrated by Upjohn L.J. in *Astley Industrial Trust Ltd.* v. *Grimley.*[3] In the final analysis the existence and extent of this second stipulation must inevitably depend on the facts and circumstances of the individual case. There is no unqualified implied obligation of fitness. Liability for breach of this obligation may be negatived by an exception clause.

I turn then to apply these propositions of law to the facts of this case. The vehicle was delivered to the appellant with a defective axle, but the learned president has fully analysed the facts and has shown how on these facts it is impossible to treat the finance company as being in breach of the fundamental term which I have mentioned above. The appellant accepted the vehicle which was contracted for and used it for about three months, running it for about 2,091 miles. On those facts I agree with the court below, and that matter therefore passes from consideration.

On the second implied stipulation (of fitness) it can be said that the appellant might originally have had some claim for damages against the finance company for the defective condition in which she found the vehicle but for the fact that in clause 1(iv) of the agreement the finance company excluded liability so, in my opinion, they lawfully could. The defect, as found by the learned president (with whose finding I agree) was not so serious as to constitute breach of a fundamental term, so that the exception clause applied in favour of the finance company. Even on the facts of the case, there is no breach of the implied stipulation (of fitness).

The finance company counterclaimed for $2,259.55 being the amount due under clause 6 of the Hire-purchase Agreement (P.1). Clause 6 reads:—

> "If the owner retakes possession under clause 3 hereof, the hirer shall pay to the owner by way of compensation for depreciation the amount, if any, by which one-half of the hire purchase price exceeds the total of the sums paid and the sums due in respect of the hire purchase price immediately before retaking possession, together with any other sums due and payable hereunder at the date of the termination aforesaid."

And the relevant portion of clause 3 reads:—

> "If the hirer shall make default in payment of any monthly sum payable for seven days after the same shall become due (whether payment thereof shall have been demanded or not) or shall fail to observe or perform any of the other terms and conditions of this agreement . . . . it shall be lawful for the owner subject to any statutory restrictions to the contrary: (a) without notice to terminate the hiring and resume possession of the vehicle . . . ."

The appellant on the other hand contended that the said sum of $2,259.55 is in the nature of a penalty as opposed to a genuine pre-estimate of damage. It now remains to determine whether the amount as stipulated in clause 6 of the agreement is a penalty or a genuine pre-estimate of liquidated damages. There is ample authority on this subject and appropriate tests have been worked out in a number of leading authorities of which I only need refer to *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*[4] where Lord Dunedin remarked:—

> "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage".

(See also the House of Lords case of *Bridge* v. *Campbell Discount Co. Ltd.*[5]). I find it difficult to regard this sum stipulated in clause 6 as a genuine pre-estimate of loss which would be suffered by the finance company under circumstances as specified in clause 3. In this case the car was returned to the dealers who had accepted it on behalf of the finance company after a period of 3 months which is only one-eighth of the 24 months which the hire purchase agreement was to run. No definite time was mentioned but the car was subsequently sold for $4,800 and I imagine that it would be in the interests of the finance company to sell it at the earliest opportunity. It would appear the amount as stipulated in clause 6 is to secure that the appellant will not determine the agreement — irrespective of when — until at least

one-half of the purchase price has been paid. If it is decided that the amount in clause 6 is a pre-estimate of liquidated damages, then coupled with the amount ($4,800) of the resale of the car, one finds that the finance company have made a profit very much greater than they first set out to make at the expense of the other party. In the circumstances of the case, I am of the view that the terms in clause 6 embrace every characteristic of a penalty and I accordingly hold that the claim founded on clause 6 must fail.

I now turn to the question of damages. There are two aspects involved, first, the finance company can only recover damages for breach of the whole contract if the hirer has in fact committed such a breach of the contract as shows that it is reasonable for the former to terminate the contract. For instance, where the hirer pays no instalments and clearly does not intend to go on with the hiring, the only reasonable solution for the impasse is for the finance company to retake the hired article (see *Overstone Ltd.* v. *Shipway* [6]). But where the hirer has merely made default in the payment of two instalments and there is no repudiation of the contract by the hirer accepted as such by the finance company, it would not be reasonable for the latter to terminate the contract (see *Financings Ltd.* v. *Baldock* [7]). The appellant in the present case has evinced an intention not to go on with the hiring. She returned the motor car and it was accepted by the dealers on behalf of the finance company. The reasonable solution of the situation is for the finance company to terminate the contract and resume possession of the motor car.

The second aspect is the assessment of damages. The principle is this: it is the court's duty to endeavour to determine the amount of loss suffered by the injured party and, so far as money can do it, to put him in the same position as if the contract had been performed. A necessary consideration in that direction is that an allowance or discount by way of rebate should be made in respect of accelerated payments to the owners (finance company), and the proper figure is not a matter of mathematical calculation. This is well illustrated by three cases. In *Yeoman Credit Ltd.* v. *Waragowaki* [8] a hirer paid the initial deposit in respect of a motor car, but made no further payment. Six months after the date of the agreement the owners repossessed the car and sold it for what was found to be the best price obtainable in the circumstances. The owners terminated the agreement and they were clearly entitled to recover the arrears of instalments which had accrued up to the date of termination. In addition the Court of Appeal unanimously held that the owners were entitled to damages for the hirer's breach of contract. Such damages were based upon the total hire-purchase price less the aggregate of (1) sums previously paid towards the hire-purchase price; (2) the amount of arrears already recovered; (3) the sale proceeds of the repossessed motor car; and (4) the amount of the option fee. It should be observed that no deduction was made in respect of the acceleration of payments to the owners.

In *Yeoman Credit Ltd.* v. *McLean* [9] the hirer had defaulted in the payment of four monthly instalments. The plaintiff finance company claimed damages on the basis laid down in *Waragowaki's* case, but Master Jacob deducted a sum of £65 by way of an allowance or discount for the accelerated receipt by the plaintiffs, within six months of the agreement, of nearly half of their capital outlay. The point was that both capital and profit were repayable over a period of three years. "These two factors," said Master Jacob, "the capital outlay and the hire charges, are directly interconnected and related to each other — the one being a percentage of the other, and the two together making the aggregate of the hire-purchase price payable by instalments over the currency of the agreement." In assessing damages the learned master therefore deducted a sum which represented a reasonable percentage on the amount of the capital received in respect of the period between the date of its receipt and the date when the hire-purchase agreement was due to expire. In making this deduction Master Jacob relied on the principle explained in *Interoffice Telephones Ltd.* v. *Robert Freeman Co. Ltd.* [10] and he stated that the accelerated receipt of the proceeds of sale represented moneys in the hands of the plaintiffs which they would, in the ordinary course of their business as a finance company, put to use again to earn a further profit or interest.

In *Overstone Ltd.* v. *Shipway, supra,* the hirer paid the initial deposit but none of the instalments. After four months the owners retook possession of the vehicle and subsequently sued for damages for breach of contract. The Court of Appeal made a deduction in respect of the accelerated receipt by the plaintiffs of part of their capital outlay. Holroyd Pearce L.J. (as he then was) expressly approved the basis of calculation used by Master Jacob in *Yeoman Credit Ltd.* v. *McLean* as a convenient guide to the assessment of damages, though he said that it was not the function of a court to effect an exact calculation. Davies L.J., who had delivered judgment in the *Waragowaki* case, expressly agreed with the sort of approach to the problem that was adopted by Master Jacob, though it did not arise in the *Waragowaki* case.

I assess the amount of loss suffered by the finance company in the sum of $824.10. To that figure must be added the sum of $210 which represents two months' arrears of instalments, thereby making a total of $1,034.10. I cannot follow how the learned president had arrived at the sum of $414.10 as representing actual loss. The sum of $1,034.10 is made up as follows:—

Cash price of the car		$5,800.00
Extras		409.10
Hire Purchase Charge		520.00
		$6,729.10
Less the following items:—		
Option money paid	$1,000	
One instalment paid	105	
Resale of car	4,800	5,905.00
		824.10
Add two instalments due (at $105 p.m.)		210.00
Actual loss		$1,034.10

I have considered the question of allowance or discount for the accelerated receipt by the finance company of $4,800 on the resale of the car. The hire-purchase charges or interests of $520 are for a period of two years. Three months had lapsed before they retook possession of the vehicle. The hire-purchase charges on the remainder of the hire period would be twenty-one months and that would amount to $455 ($\frac{\$520}{24} \times 21$). It is only fair that the appellant be allowed a deduction of this amount. In the circumstances, I would dismiss the appeal with costs, set aside the sum of $414.10 as awarded by the learned president and substitute a sum of $579.10 ($1,034.10 minus $455) as damages to the finance company.

Appeal dismissed.

Solicitors: *Oorjitham & Lam; Shearn, Delamore & Co.*

ABDUL KARIM v. MOHAMED TAIB & ANOR.

[O.C.J. (Syed Othman J.) March 27, 1969]
[Kuantan — Election Petition No. 1 of 1968]

Election — Nomination — Objection to, on ground of candidate's failure to insert name in prescribed consent form — Whether such omission invalidated nomination — Power of court to review returning officer's decision — Elections (Conduct of Elections) Regulations, 1959 — Election Offences Ordinance, 1954, s. 32(b).

The petitioner and the 1st respondent filed their nomination papers to contest in the Parliamentary election for the Kuantan constituency. The nomination papers were in the forms prescribed in the First Schedule to the Elections (Conduct of Elections) Regulations, 1959. At the close of the nomination, the 1st respondent objected to the petitioner's nomination on the ground that he had failed to insert his name in the attestation clause of Form 3 of the said Regulations. The objection was upheld by the 2nd defendant, the returning officer, and the petitioner's nomination was held to be invalid for non compliance with the Regulations. The first respondent was returned unopposed. The petition sought a declaration under section 32(b) of the Election Offences Ordinance, 1954 that the election of the 1st respondent was void.

Held, allowing the petition: (1) the returning officer's decision was open to review by the court as the matter came within the ambit of the wordings of section 32(b) of the Election Offences Ordinance;

(2) the petitioner's omission to insert his name in the attestation clause of Form 3 of the said Regulations did not invalilate his nomination. An omission should not be regarded as a non-compliance with the Regulations unless it amounts to a misnomer or an inaccurate description within the meaning of regulation 28 of the said Regulations or unless it affects the substance or is calculated to mislead.

ELECTION PETITION.

V. Verappan for the petitioner.

Ten Chin Yong for the 1st respondent.

Abdullah bin Ghazali (Sr. Federal Counsel) for the 2nd respondent.

Cur. Adv. Vult.

Syed Othman J.: On the 11th November, 1968, a Parliamentary election was held for the Kuantan constituency. The first respondent and the petitioner were the only candidates. A nomination paper in the prescribed form nominating the petitioner as a candidate for the election was delivered in due time to the second respondent who was the returning officer for the election. The nomination was subscribed by a proposer and a seconder and by eight other electors as assenting to the nomination. The petitioner signified his consent in the portion of the form prescribed for the purpose at page 2. This portion reads as follows:—

"I, ABDUL KARIM BIN HUSSAIN nominated in the foregoing nomination paper hereby consent to such nomination as candidate for election as a member of the Dewan Ra'ayat for the Constituency of KUANTAN and name as my address for service of process and papers:

Address: B-664, Galing Besar, Kuantan, Pahang.

I wish to be described on the ballot paper as KARIM.

My Identity Card Number is PA. 000357 (2505485).

Witness my hand this 11th day of November, 1968.

Signed by the said nominee.....

in the presence of: Sd. Abdul Karim bin Hussain
Sd. (illegible) *Signature of Candidate*

Signature of Witness

Address of Witness:
235, Kampong Bharu Tanah Puteh,
Kuantan, Pahang."